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No.

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

October Term, 2006

FABIO OCHOA-VASQUEZ,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

During the selection of the jury that convicted a Hispanic male of criminal offenses, prosecutors used 5 of their 6 peremptory challenges to strike Hispanic males. The district court, however, found that this pattern of both ethnic and gender-based strikes was not enough to require even an explanation from the prosecutors under *Batson v. Kentucky*, 476 U.S. 79, 90 L.Ed. 2d 69, 106 S.Ct. 1712 (1986). The Eleventh Circuit then affirmed this ruling by deferring to the district court's discretion. The Eleventh Circuit's ruling creates at least two splits in the circuits warranting review by this Court:

I. SHOULD THE COURT RESOLVE TWO SPLITS IN THE CIRCUITS CONCERNING THE CONSTRUCTION OF *BATSON V. KENTUCKY*: (A) WHETHER THE FIRST PRONG OF *BATSON*'S THREE-PART TEST CAN BE ESTABLISHED THROUGH STATISTICS ALONE; AND (B) WHETHER AN APPELLATE COURT SHOULD REVIEW A DISTRICT COURT'S REJECTION OF A DEFENDANT'S *PRIMA FACIE* SHOWING UNDER AN ABUSE OF DISCRETION OR *DE NOVO* STANDARD?

In extraditing Petitioner to stand trial in the United States, the Colombian government and court system expressly conditioned the extradition on Petitioner receiving no more than 12 years in prison – the maximum sentence he could have received under Colombian law for the same offenses. Over objection, the district court proceeded to sentence Petitioner to 365 months in prison, and the Eleventh Circuit affirmed without elaboration, creating yet another split in the circuits warranting review by this Court:

II. WHETHER AN EXTRADITED DEFENDANT HAS THE RIGHT TO ENFORCE THE LIMITS PLACED ON HIS SENTENCE BY THE REQUESTED COUNTRY?

INTERESTED PARTIES

There are no parties to the proceeding other than those named in the caption of the case.

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PETITION FOR WRIT OF CERTIORARI

Fabio Ochoa-Vasquez respectfully petitions the Supreme Court of the United States for a writ of certiorari to review the judgment of the United States Court of Appeals for the Eleventh Circuit, rendered and entered in 11th Cir. Case Nos. 03-14400 and 04-10718 on October 20, 2005, and reported at 428 F.3d 1015 (11th Cir. 2005).

OPINION BELOW

A copy of the decision of the United States Court of Appeals for the Eleventh Circuit, which affirmed the judgment and conviction of the United States District Court for the Southern District Florida, is contained in the **APPENDIX A**. Ochoa's petition for rehearing en banc was denied on January 12, 2006. *See* **APPENDIX B**.

STATEMENT OF JURISDICTION

This Petition has been filed within the extended time period granted by this Court by order dated April 3, 2006, permitting this Petition to be filed by May 27, 2006. The Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The constitutional provisions, statutes and rules involved in this case are:

U.S. Const. amend V:

> No person shall be ... deprived of life, liberty, or property, without due process of law[.]

U.S. Const. amend VI:

> In all criminal prosecutions, the accused shall enjoy the right to a ... trial, by an impartial jury....

U.S. Const. amend. XIV, § 1:

> .....No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State ...deny to any person within its jurisdiction the equal protection of the law.

STATEMENT OF THE CASE

A. PROCEDURAL HISTORY

In early 1999, law enforcement officials in the United States and Colombia commenced a joint narcotics investigation, "Operation Millennium," that resulted in a series of indictments in the Southern District of Florida, including the one returned against Petitioner Fabio Ochoa-Vasquez ("Ochoa"). (DE111; DE349: 44-49, 161.) Ochoa was charged with conspiring with 43 co-defendants to distribute and import cocaine into the United States between December 17, 1997,[1] and August 26, 1999. (DE 106.) On October 13, 1999, he was arrested in Colombia and subsequently extradited to Miami. (DE 508-509.) After a 3-week trial in May 2003, he was convicted of both counts and, on August 26, 2003, sentenced to 365 months in prison. (DE 1581, 1562.)

B. STATEMENT OF THE FACTS

1. The anonymous jury and enhanced security

Before trial the government moved for an anonymous and "partially sequestered" jury, asserting that Ochoa – allegedly a former leader of the "Medellin Cartel" – posed a threat to obstruct justice during his trial. (DE 966.) The government contended that Ochoa's rights could be adequately protected by an expansive voir dire and a lengthy jury questionnaire. (DE 966: 12.) Ochoa opposed the motion

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[1] Extraditions are legal in Colombia but only for crimes committed after December 16, 1997. *See* Argument Section II *infra*.

and, in the alternative, requested that an "extensive jury questionnaire" be used. The district court granted the government's motion for an anonymous jury but denied Ochoa's (unopposed) motion for a jury questionnaire. (DE: 1195, 1267, 1318.) (DE 982: 1, 13; DE 1271.) Thereafter, U.S. Marshals were used to transport jurors to trial in vans from staging areas.

2. The *Batson* challenges and rulings

Of the 82 venire members from which Ochoa's jury was chosen, 44 (54%) identified themselves as Hispanic.[2] The district court allotted the government 6 peremptory strikes for the selection of the 12 jurors and 3 strikes for the section of 5 alternates. None of the alternates chosen actually served on Ochoa's jury.[3]

As an extradited Colombian national, Ochoa was an Hispanic male. The prosecutors proceeded to use *all* of their first 4 strikes to eliminate Hispanic males (juror numbers 051, 221, 234 and 379) from the jury. When defense counsel objected that the prosecutors' conduct violated Ochoa's right to equal protection under *Batson v. Kentucky*, 476 U.S. 79, 90 L.Ed. 2d 69, 106 S.Ct. 1712 (1986), the prosecutors responded that "we haven't used our challenges for all Hispanic males." (DE 1468: 45-48, 86.) The Eleventh Circuit later found that this denial was incorrect. *See Ochoa-Vasquez*, 428 F.3d at 1039 ("[t]he evidence would later reveal that [the prosecutors] had" used their first 4 strikes on Hispanic males).

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[2] As discussed below, Ochoa was denied access to these statistics until after he was convicted – and long after his *Batson* challenges had been rejected by the district court.

[3] The Eleventh Circuit did not disagree but believed that the record was "not clear whether any alternates ultimately participated in the final verdict." *Ochoa-Vasquez*, 428 F.3d at 1046, n. 42.

The prosecutors also claimed that they had accepted an Hispanic male juror (No. 494). The Eleventh Circuit later found that this assertion was also incorrect. *See Ochoa-Vasquez*, 428 F.3d at 1010, n. 32 ("[i]n fact, the questionnaires showing self-reporting ethnicity, produced after the trial, show that juror 494 is not Hispanic").

Finally, the prosecutors claimed that they could not have known that the strikes were against Hispanics because the jurors' names had been withheld from both sides. Despite counsel's rejoinder that he had lived "in Dade County for well over 40 years" and that the Hispanic origin of the stricken jurors was "obvious" from their accents, facial features and skin color, the district court refused to require the prosecutors to provide ethnic-neutral reasons for the strikes. (DE 1468: 87.)

Thereafter, the prosecutors used 1 of their last 2 peremptories to eliminate another Hispanic male (for a total of 5 of their 6 peremptories). Counsel again objected and requested, several times, for the stricken jurors to be brought back so that their ethnic backgrounds could be confirmed on the record. The court refused, finding that Ochoa could not establish a *prima facie* case of discrimination because no one could allegedly ascertain which anonymous venire members were Hispanic. (DE 1468: 47-48, 87.) While the court also again refused to require explanations from the prosecutors, they nonetheless volunteered an ethnic-neutral reason for striking Juror No. 379, who had been identified as a photographer, claiming that they were "seeking jurors who [were] of a professional background." (DE 1468: 45-47, 53, 87-88.) Ochoa, however, demonstrated that this explanation was a pretext due to several non-professional, non-Hispanic jurors the prosecutors had accepted. (DE 1468: 86-88.)

Following Ochoa's conviction, the court agreed to release information about the ethnicity of the jurors. The information confirmed that the 5 stricken jurors were indeed Hispanic, as alleged by defense counsel. The statistics also revealed that 4 of the 12 jurors

(30%) were Hispanic. However, 2 of the Hispanic jurors were selected only *after* the prosecutors had exhausted all of their 6 peremptory challenges.

3. The trial evidence

For purposes of this Petition, Ochoa adopts the factual recitation contained in the Eleventh Circuit's opinion, **Appendix A**. These facts are not germane to the questions presented.

C. THE ELEVENTH CIRCUIT'S DECISION

On appeal to the Eleventh Circuit, Ochoa challenged the necessity of the anonymous jury and the district court's refusal to take affirmative curative steps, before, during or after trial, to ensure that he was not prejudiced by the security measures imposed. He further argued that the government exploited these defective procedures to violate Ochoa's rights to due process and equal protection under *Batson*. Finally, Ochoa challenged his conviction and sentence as in violation of the terms of his extradition from Colombia and international law.

On October 20, 2005, the Eleventh Circuit – in a 2-1 majority opinion – affirmed Ochoa's conviction and sentence, rejecting his constitutional challenges to jury selection. *See* **Appendix A**.[4] With respect to the procedures utilized during voir dire, the majority ruled that Ochoa was not entitled to any specific questions about how the anonymous procedures and security measures could have affected Ochoa's presumption of innocence. *See Ochoa-Vasquez*, 428 F.3d at 1037 (Ochoa "had no right to have the jury questioned specifically about the anonymity procedures" since voir dire was "not ... a means of investigating the potential effect of anonymity on the jurors' ability

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[4] The Eleventh Circuit also rejected Ochoa's challenge to his conviction and sentence under the "rule of specialty" without discussion.

to presume the defendant innocent"). The majority also affirmed the district court's construction of *Batson*, agreeing that Ochoa had not even satisfied the first step of *Batson* – demonstrating a *prima facie* claim of discrimination, triggering an explanation from the prosecutors for their behavior. *Id.*

According to the majority, Ochoa could not satisfy his burden since the members of the venire were identified only by numbers. While the majority acknowledged that "Ochoa's attorney did correctly determine at trial that the five struck jurors were Hispanic," it nonetheless found that "we have no way of knowing whether the government could tell whether the jurors it struck were Hispanics." *Id.* at 1043. Alternatively, the majority ruled that the prosecutors use of 5 of their 6 challenges to eliminate Hispanic males did not establish a *prima facie* case under *Batson*, even in combination with the prosecutors' statements. *Id.* at 1043-44. The majority rejected Ochoa's statistical showing since some Hispanics managed to sit on the jury and because Ochoa's counsel had also exercised challenges against some Hispanics. *Id.* at 1044-45.

Judge Barkett dissented from the majority's rulings. Judge Barkett found that the district court's express refusal to ask specific questions about the heightened security "violated both Ochoa's Sixth Amendment and due process rights." *Id.* at 1049-50. Judge Barkett also disagreed with the majority's construction of the first prong of *Batson*. Judge Barkett believed that Ochoa had plainly made a *prima facie* showing of discrimination by correctly establishing that the prosecutors used their first 4 peremptories – a challenge rate of 100% – and 5 of their first 6 peremptories – a challenge rate of 83.3 % – to eliminate Hispanic males from the venire. *Id.* at 1055 & n. 16. Judge Barkett also condemned the district court for using the juror anonymity to block Ochoa's efforts to satisfy his *prima facie* burden under *Batson*. "As important as juror anonymity measure may be, they cannot be permitted to defeat jurors' and litigants' rights under the Equal Protection Clause, especially since there can be no security risk in granting access to self-reported racial information to litigants (if not to the public)." *Id.* at 1055-56.

REASONS FOR GRANTING THE WRIT

I.

THE COURT SHOULD GRANT THIS PETITION TO RESOLVE TWO CIRCUIT SPLITS CONCERNING THE PROPER CONSTRUCTION OF *BATSON V. KENTUCKY*: (A) HOW OR UNDER WHAT CIRCUMSTANCES STATISTICS ALONE CAN BE USED TO ESTABLISH A DEFENDANTS *PRIMA FACIE* CASE OF DISCRIMINATION; AND (B) THE PROPER STANDARD OF APPELLATE REVIEW WHEN A TRIAL JUDGE HAS FOUND THAT A DEFENDANT HAS FAILED TO ESTABLISH A *PRIMA FACIE* CASE.

In *Batson v. Kentucky*, 476 U.S. 79, 90 L.Ed.2d 69, 106 S.Ct. 1712 (1986), this Court held that the use of race-based peremptory challenges violated the Equal Protection Clause of the Fourteenth Amendment. *Batson*, 476 U.S. at 86, 90 L.Ed.2d at 80, 106 S.Ct. at 1717. The Court also established a three-step process for determining when a constitutional violation is committed. First, the defendant must make out a *prima facie* case "of purposeful discrimination in selection of the petit jury." *Id.*, 476 U.S. at 93-94, 90 L.Ed 2d at 85-86, 106 S.Ct. at 1721. Second, once the defendant has made out a *prima facie* case, the "burden shifts to the [government] to explain adequately the racial exclusion" by offering permissible non-discriminatory justifications for the strikes. *Id.*, 476 U.S. at 94, 90 L.Ed.2d at 86, 106 S.Ct. at 1721. Third, "[i]f a race-neutral explanation is tendered, the trial court must then decide ... whether the opponent of the strike has proved purposeful ... discrimination." *Purkett v. Elem*, 514 U.S. 765, 767, 131 L.Ed.2d 834, 115 S.Ct. 1769 (1995) (per curiam).

On two occasions, first in *Batson* itself and more recently in *Johnson v. California*, 545 U.S. 162, 162 L.Ed.2d 129, 125 S.Ct. 2410 (2005), the Court has discussed the minimal nature of the first step. However, as discussed below, the Court has yet to delineate the precise manner in which a defendant may establish his or her *prima facie* case.

In *Batson*, the Court ruled that a defendant made out a *prima facie* case "by showing that the totality of the relevant facts gives rise

to an inference of discrimination." *Batson*, 476 U.S. at 93-94, 90 L.Ed 2d at 85-86, 106 S.Ct. at 1721, citing *Washington v. Davis*, 426 U.S. 229, 239-242, 48 L.Ed.2d 597, 96 S.Ct. 2040 (1976). Although the Court did not limit a defendant to one particular method of proof, the Court did intimate that a statistical disparity in a prosecutor's pattern of strikes could alone by sufficient to establish a *prima facie* case of discrimination. Specifically, the Court stated:

> In deciding whether the defendant has made the requisite [*prima facie*] showing, the trial court should consider all relevant circumstances. *For example, a "pattern" of strikes against black jurors included in the particular venire might give rise to an inference of discrimination.* Similarly, the prosecutor's questions and statements during *voir dire* examination and in exercising his challenges may support or refute an inference of discriminatory purpose. These examples are merely illustrative.

Batson, 476 U.S. at 96-97, 90 L.Ed.2d at 88, 106 S.Ct. at 1723 (emphasis added).

Batson did clearly establish that, whatever the method of proof, the defendant's burden in establishing a *prima facie* claim of discrimination was not intended to be a heavy one. Thus, the Court specifically directed lower courts to its Title VII jurisprudence, where it had previously "explained the operation of *prima facie* burden of proof rules." *Id.*, 476 U.S. at 94 n. 18, 90 L.Ed. 2d at 86, 106 S.Ct. at 1721. *See also United States v. Overton*, 295 F.3d 270, 279 n. 10 (2d Cir. 2002) ("[t]he familiar three-step evidentiary framework that the Supreme Court imported into the *Batson* context 'is derived from the Supreme Court's equal protection and Title VII jurisprudence'"), quoting *Evans v. Smith*, 220 F.3d 306, 312 (4th Cir. 2000). In *Texas Department of Community Affairs v. Burdine*, 450 U.S. 248, 253, 67 L. Ed 2d 207, 101 S.Ct. 1089 (1981), specifically cited in *Batson* as a source of the framework the Court was applying, the Court held that "the burden of establishing a *prima facie* case of [discrimination] is not onerous." The explicit incorporation of *Burdine*'s analytic

structure into the *Batson* opinion unequivocally signaled the Court's decision to retain, in the jury selection context, the minimal threshold required of claimants making a *prima facie* case of discrimination in employment cases in order to shift the burden of production to the non-movant. *See Overton*, 295 F.3d at 279 n. 10 (noting that "the minimal burden put on a defendant to make a *prima facie* showing under *Batson*[] [is] a burden similar to that placed on plaintiffs in Title VII and equal protection jurisprudence"). The Court has since confirmed the limited nature of the showing required by *Batson* to make a *prima facie* case:

> We did not intend the first step to be so onerous that a defendant would have to persuade the judge – on the basis of all the facts, some of which are impossible for the defendant to know with certainty – that the challenges was more likely than not the product of purposeful discrimination. Instead, a defendant satisfies the requirements of *Batson*'s first step by producing evidence sufficient to permit the trial judge to draw an inference that discrimination has occurred.
>
> ***
>
> [T]he *Batson* framework is designed to produce actual answers to suspicions and inferences that discrimination may have infected the jury selection process. The inherent uncertainty present in inquiries of discriminatory purpose counsels against engaging in needless and imperfect speculation when a direct answer can be obtained by asking a simple question.

Johnson, 545 U.S. at ___ 162 L.Ed.2d at 139, 125 S.Ct. at 2417-18.

The Court in *Batson* also strongly suggested that a defendant could satisfy his *prima facie* burden simply through a statistical analysis of the prosecutor's conduct in exercising his or her peremptory challenges. Thus, after stating that "[t]he showing necessary to establish a *prima facie* case of purposeful discrimination in selection of the venire may be discerned in this Court's decisions," the Court cited as examples, *Castaneda v. Partida*, 430 U.S. 482, 51

L.Ed. 2d 498, 97 S.Ct. 1272 (1977), and *Alexander v. Louisiana*, 405 U.S. 625, 31 L.Ed.2d 536, 92 S.Ct. 1221 (1972). *See Batson*, 476 U.S. at 94, 90 L.Ed.2d at 86, 106 S.Ct. at 1722. In *Castaneda*, the Court found that a defendant had made out a *prima facie* case of discrimination against Mexican-Americans in Texas grand juries based entirely on a statistical analysis of the grand jury selection process. *See Castaneda*, 430 U.S. at 495-96, 51 L.Ed. 2d at 511-12, 97 S.Ct. at 1280-81.

Numerous courts have construed *Batson* and *Johnson* as (1) requiring only a minimal threshold showing by a defendant (2) that, in most cases, can be satisfied solely by showing a pattern of strikes against a particular racial or ethnic group. *See, e.g., Williams v. Runnels*, 432 F.3d 1102, 1107 (9th Cir. 2006) (reaffirming Ninth Circuit rule that "a defendant can make a *prima facie* showing based on a statistical disparity alone" and finding that prosecutor's use of 3 of his first 4 peremptories on African-Americans satisfied the defendant's *prima facie* burden, even though other African-Americans were selected for the jury) (citations omitted); *United States v. Stephens*, 421 F.3d 503, 513-14 (7th Cir. 2005) (where prosecutors used 6 of their 7 peremptories to eliminate minorities from the jury, defendant established a *prima facie* case); *Paulino v. Castro*, 371 F.3d 1083, 1091 (9th Cir. 2004) ("a defendant can make a *prima facie* showing based on statistical disparities alone" and holding that a prosecutor's use of 5 of 6 peremptories to exclude African-Americans established a *prima facie* case); *Holloway v. Horn*, 355 F.3d 707, 722 (3rd Cir. 2004) (prosecutor's use of 7 of 8 peremptories against African-American's "was certainly strong enough to suggest an intention of keeping blacks off the jury) (citations omitted); *Overton*, 295 F.3d at 278-79 ("we have no doubt that statistics, alone and without more, can, in appropriate circumstances, be sufficient to establish the requisite *prima facie* showing under *Batson*" ... [a]nd "we believe that to hold otherwise would undermine the general antidiscrimination principle established by *Batson*"); *Fernandez v. Roe*, 286 F.3d 1073, 1077-80 (9th Cir.) (defendant made a *prima facie* showing based on only statistical disparities), *cert. denied*, 537 U.S. 1000, 154 L.Ed.2d395, 123 S.Ct.

514 (2002); *Jones v. Ryan*, 987 F.2d 960, 971 (3rd Cir. 1993) (holding that a *prima facie* case was made where minorities comprised 20% of the venire, but the prosecutor's exclusion rate was 75%); *United States v. Alvarado*, 923 F.2d 253, 256 (2nd Cir. 1991) ("[w]e think a challenge rate nearly twice the likely minority percentage of the venire strongly supports a *prima facie* case under *Batson*); *Robinson v. United States*, 878 A.2d 1273, 1285 (D.C. App. 2005) ("[u]nexplained statistical disparities" of a sufficient "magnitude" are sufficient "to establish a *prima facie* case of discrimination," and finding a prima facie case where the prosecutor used 6 of 10 peremptories to eliminate black females from the jury); *Ex parte Thomas v. State*, 659 So.2d 3, 8 (Ala. 1994) (prosecutor's use of "9 of his 10 strikes to strike blacks from the venire ... made a *prima facie* showing of a *Batson* violation"). Even the Eleventh Circuit, prior to its ruling in *Ochoa*, had adhered to this principle. *See, e.g., Davis v. Sec. For the Dept. of Corrections*, 341 F.3d 1310, 1316 (11th Cir. 2003) (*prima facie* case of discrimination established when prosecutor used 2 peremptories to strike 2 blacks from the jury when none had been seated among the first 10 jurors accepted); *Bui v. Haley*, 321 F.3d 1304, 1316 (11th Cir. 2003) (defendant established *prima facie* showing of possible discrimination by pointing out that the prosecutor used 9 of 13 peremptories to eliminate African-Americans from the jury) .

The Eleventh Circuit's ruling in *Ochoa* that the composition of the jury ultimately chosen in the defendant's case supported the district court's refusal to proceed through *any* of the three-step *Batson* analysis was also directly contrary to this Court's ruling in *Alvarado v. United States*, 497 U.S. 543, 111 L.Ed.2d 439, 110 S.Ct. 2995 (1990) (per curiam). In *Alvarado*, the Court squarely rejected the Second Circuit's rule that no inquiry into the merits of a prosecutor's discriminatory exercise of peremptory challenges was required if the jury finally chosen represented a fair cross section of the community. And, other circuits have since made clear that a *prima facie* showing that a prosecutor has used peremptory challenges in a discriminatory fashion is *not* nullified by evidence that "the prosecutor passes up the opportunity to strike some [minority] jurors," *Brinson v. Vaughn*,

398 F.3d 225, 233 (3rd Cir.), *cert. denied*, ___ U.S. ___, 163 L.Ed. 2d 359, 126 S.Ct. 473 (2005), or that the jury ultimately chosen includes some members of the group the prosecutor was seeking to exclude.

> A skilled but racially biased attorney could learn to manipulate the strike process so as to be able to strike a certain number of blacks from the venire on the basis of race, and yet not be called to account for the racially based strikes, as long as some blacks were left on the jury. Such a result should not be approved.

Thomas, 659 So.2d at 7. *Accord Lancaster v. Adams*, 324 F.3d 423, 434 (6th Cir.) ("[w]here purposeful discrimination has occurred, to conclude that the subsequent selection of an African-American juror can somehow purge the taint of a prosecutor's impermissible use of a peremptory strike to exclude a venire member on the basis of race confounds the central teachings of *Batson*"), *cert. denied*, 540 U.S. 1004, 157 L.Ed.2d 409, 124 S.Ct. 536 (2003); *United States v. Harris*, 192 F.3d 580, 587 (6th Cir. 1999) (rejecting the argument that "the failure to exclude one member of a protected class is sufficient to insulate the unlawful exclusion of others"); *Turner v. Marshall*, 63 F.3d 807, 813 (9th Cir. 1995) (holding that a *prima facie* case was established when the government used 56% of its peremptory challenges against African Americans, despite the fact that 4 African Americans remained on the jury), *overruled on other grounds sub nom., Tolbert v. Page*, 182 F.3d 677 (9th Cir. 1999) (en banc); *United States v. Joe*, 928 F.2d 99, 103 (4th Cir. 1999) ("[t]he district court erred in ruling that a *Batson* violation did not occur since members of the defendants' racial group were seated on the jury"); *Alvarado*, 923 F.2d at 256 ("[a] prosecutor may not avoid the *Batson* obligation to provide race-neutral explanations for what appears to be a statistically significant pattern of racial peremptory challenges simply by forgoing the opportunity to use all of his challenges against minorities").

That some minority jurors managed to get chosen is largely irrelevant, especially at the *prima facie* stage, because *Batson* was "designed to ensure that a [prosecutor] does not use peremptory challenges to remove *any* [minority] juror because of his race."

Batson, 476 U.S. at 99 n. 22, 90 L.Ed.2d at 89 n. 22, 106 S.Ct. at 1724 n. 22 (emphasis added). *Accord Jones v. Ryan*, 987 F.2d 960, 972 (3rd Cir. 1993) ("the exclusion of even one juror on the basis of race may be sufficient to establish a prima facie case"); *Horn*, 355 F.3d at 722 (pattern of strikes established *prima facie* case even though some African-Americans ultimately served on the jury) (citations omitted); *United States v. Lane*, 866 F.2d 103, 106 (4th Cir. 1989) ("striking only one black prospective juror for a discriminatory reason violates a black defendant's equal protection rights, even when other black jurors are seated and even when valid reasons are articulated for challenges to other black prospective jurors"); *United States v. Battle*, 836 F.2d 1084, 1086 (8th Cir. 1987) ("under *Batson*, the striking of a single black juror for racial reasons violates the equal protection clause, even though other black jurors are seated, and even when there are valid reasons for the striking of some black jurors").[5]

Once again, at least before its ruling in *Ochoa*, the Eleventh Circuit had also adhered to this principle. *See, e.g., Eagle v. Linahan*, 279 F.3d 926, 942 (11th Cir. 2001) (black defendant raised *prima*

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[5] At the first step of *Batson*, it also makes no sense to *require* an evaluation of the eventual ethnic composition of the jury that is ultimately picked. At the time of Ochoa's first *Batson* objection, the district court was called upon to determine whether a pattern of 4 out of 4 strikes used against Hispanic males was sufficient to require an explanation from the prosecutors. At that point, of course, neither the parties nor the district court could know the eventual composition of the jury. Yet, the district court was called upon to determine whether a *prima facie* case had been established to require contemporaneous explanations from the prosecutors. *See Horn*, 355 F.3d at 728 (finding that a thorough statistical analysis was more pertinent at the third step in *Batson* , rather than at the *prima facie* stage, since the defendant's objections are lodged during the voir dire process but before its conclusion and holding that requiring more at the first stage "places an irrelevant hurdle in the way of reaching the second step in the *Batson* process); *Joe*, 928 F.2d at 103 (criticizing district court's delay in assessing *Batson* challenge).

facie inference of discrimination when prosecutors used 9 of 10 peremptory challenges to strike black jurors, even though 4 blacks served on jury); *Cochran v. Herring*, 43 F.3d 1404, 1412 (11th Cir. 1995) (when prosecutors used 7 of 14 peremptories to strike 7 of 9 blacks on the venire, defendant established prima facie case of discrimination, even though jury contained 2 black members); *United States v. David*, 803 F.2d 1567, 1571 (11th Cir. 1986) ("[u]nder *Batson*, the striking of 1 black juror for a racial reason violates the Equal Protection Clause, even where other black jurors are seated, and even when valid reasons for the striking of some black jurors are shown").

This Court, as well as circuits, have also rejected the argument, relied upon by the Eleventh Circuit in *Ochoa*, that the inference of a prosecutor's discriminatory use of peremptories is somehow nullified if *the defense* also uses their peremptories to strike minorities. *See Miller-El v. Dretke*, 545 U.S. 231, ___ n. 14, 162 L. Ed. 2d 196, 223 n. 14, 125 S.Ct. 2317, 2333 n. 14 (2005) (defendant's conduct "flatly irrelevant" to the question of whether the prosecutor's conduct revealed a desire to exclude African-Americans); *Stephens*, 421 F.3d at 514 (characterizing as "an irrelevant proposition" how the defense exercised its peremptories); *Brinson*, 398 F.3d at 234 (the trial court's "reliance on the fact that 'the defense struck blacks' was misplaced" since "legitimate defense strike[s] would not open the door for illegitimate prosecution strikes"); *Eagle v. Linahan*, 279 F.3d 926 (11th Cir. 2001) (potential *Batson* violation by prosecutor not cured by court's observation that the defendant may have also been using peremptory challenges in a discriminatory manner; *Batson* is meant to vindicate the rights of venire members, not just defendants); *Harrison v. Ricks*, 150 Fed. Appx 95 (2nd Cir. 2005) ("[t]he manner in which the defendant exercises his or her own peremptory challenges cannot reasonably be said to buttress – or undermine – an inference of discrimination by the prosecution").

The Eleventh Circuit's ruling in *Ochoa* that no *prima facie* pattern of discriminatory strikes was established by the prosecutors' use of 5 of their 6 peremptories against Hispanic males flies in the

face of both this Court's precedents in *Batson*, *Johnson* and *Miller-El*, and the holdings of other circuits interpreting *Batson*. Ochoa was an Hispanic male and the prosecutors used 5 of their 6 peremptory challenges to strike Hispanic males from the jury. Although a defendant does not *have* to be of the same race or ethnicity of the jurors discriminated against, the fact that Ochoa *was* an Hispanic male should have added to the suspicion of discriminatory intent. *Horn*, 355 F.3d at 722 (race of defendant relevant factor in *Batson* analysis). Even standing alone, the prosecutors' use of 5 of their 6 peremptories to exclude members of Ochoa's sex and ethnic background from the jury "raise[d] an inference" of discriminatory intent. The Eleventh Circuit's views that the defense strikes plus the fact that 4 Hispanics managed to stay on the jury effectively nullified the statistical disparity also were directly contrary to this Court's precedents and the overwhelming view of other circuits.

The instant Petition should be granted to resolve the split in the circuits created by the Eleventh Circuit's opinion in *Ochoa* and to give more guidance to the circuits concerning the use of statistical evidence to establish a defendant's *prima facie* burden under *Batson*. Moreover, in addition to departing from other circuits on how to construe the first step in *Batson*, the Eleventh Circuit decision to "give great deference to" the district court's finding "that Ochoa had not satisfied his burden of demonstrating a prima facie case, *Ochoa-Vasquez*, 428 F.3d at 1039, has also created a conflict concerning concerning the standard of review. *Compare Stephens*, 421 F.3d at 510-11 (""although deference is afforded fact findings in a *Batson* challenge, the *prima facie* determination is subject to *de novo* review") (citation omitted). *Accord Mahaffey v. Page*, 162 F.3d 481, 484 (7th Cir. 1998); *United States v. Alvarado*, 891 F.2d 439, 443 (2nd Cir. 1989) , *vacated on other grounds*, 497 U.S. 543, 111 L.Ed.2d 439, 110 S.Ct. 2995 (1990). *See also Robinson*, 878 A.2d at 1283 (characterizing the issue of whether a defendant has satisfied his *prima facie* burden under *Batson* as "a question of law").

The Court should also grant the Petition to define the duty of federal courts to protect a defendant's equal protection rights when "anonymous" juries are employed. As Judge Barkett correctly reasoned in her dissent, the fact that the jurors' names were withheld from the parties did not prevent the prosecutors from discriminating against Hispanic males and, therefore, should not be permitted to be used to insulate the equal protection violation. As this Court has said, "happenstance is unlikely to produce" a statistically significant "disparity." *Miller-El v. Cockrell*, 537 U.S. 322, 342, 154 L.Ed.2d 931, 123 S. Ct. 1029 (2003) (prosecutor's use of 10 of 14 strikes against African-Americans was evidence of race-based use of peremptories, even though one African-American served on the jury). The chance that the prosecutors just "happened" to use 5 of their 6 strikes against Hispanic males, in a case involving an Hispanic male defendant, is equally "unlikely."[6] At the very least, the district court should have attempted to resolve any uncertainty "by asking a simple question" – a neutral reason (as to both ethnicity and gender) for the strikes. *Johnson*, 545 U.S. at ___ 162 L.Ed.2d at 139, 125 S.Ct. at 2417-18.

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[6] The Eleventh Circuit's *Batson* analysis was defective for yet another reason – it ignored the fact that Ochoa's objections were based on *both* ethnicity and gender. *See J.E.B. v. Alabama ex rel. T.B.*, 511 U.S. 127, 128 L.Ed. 2d 89, 114 S.Ct. 1419 (1994) (extending *Batson* to prohibit discrimination on the basis of gender). The Eleventh Circuit should have considered Ochoa's challenge as directed to the category of "Hispanic males" and not just "Hispanics" generally. *See Robinson v. United States*, 878 A.2d 1273, 1284 (D.C. App. 2005) (reversing trial court for believing that "black females" was not a suspect category for equal protection purposes, finding that "discrimination against black females in jury selection is both discrimination against certain female jurors solely because they are black and discrimination against certain black jurors solely because they are female" and, hence, it is "*both* racial discrimination of the kind condemned in *Batson* and gender discrimination of the kind condemned in *J.E.B.*") (emphasis added). The gender of the venire in Ochoa's case was, of course, readily apparent despite the concealment of the jurors' names.

The Eleventh Circuit's construction of *Batson*'s first step also cannot be squared with other courts because the inference of discriminatory intent drawn from the statistics was bolstered by the prosecutors' own statements and explanations. The prosecutors – taking their cue from the district court's questions to defense counsel about how they could know that the stricken jurors were Hispanic since their names had been withheld – initially denied that they could be discriminating for that same reason. *See Ochoa-Vasquez*, 428 F.3d at 1041 (quoting prosecutor as claiming "'we don't really know whether they are or aren't [Hispanic] unless someone were to raise their hand and tell us that'"). However, as the argument continued, the prosecutors contradicted themselves, arguing that they had, in fact, accepted some jurors who they believed were Hispanic from their accents. *See id.*, 428 F.3d at 1040 (quoting prosecutor's assertion that he could determine that juror number 494 was Hispanic because he "'appears to talk with an [accent]'"). Since the prosecutors, by their own eventual admissions, *could* tell the ethnic background of the jurors from their accents and were, in fact, extraordinarily accurate in their assessments, as reflected by the statistics belatedly released by the court, the prosecutors' initial false statements denying any ability to tell the ethnic background of the jurors should have been viewed by both the district court and the Eleventh Circuit as supporting an inference of discriminatory intent, at least at the *prima facie* stage.

In addition to making inconsistent statements about their ability to determine the jurors' ethnicity, the prosecutors voluntarily gave a patently pretextual explanation for striking Juror No. 379. *See* p. 4 *supra*. Ochoa, however, easily established that the prosecutors' explanation was pretextual based on other, non-Hispanic jurors they had accepted. *Id.* This pretextual explanation should have bolstered the inference of discriminatory intent created by the statistical disparity in the prosecutors' use of their challenges and contradictory statements about whether they could determine the jurors' ethnicity. *See Miller-El*, 545 U.S. at ___, 162 L. Ed. 2d at 214, 125 S.Ct. at 2325 ("[i]f a prosecutor's proffered reason for striking a black panelist applies just as well to an otherwise-similar nonblack who is

permitted to serve, that is evidence tending to prove purposeful discrimination"); *Purkett v. Elem*, 514 U.S. 765, 768, 131 L. Ed.2d 834, 115 S.Ct. 1769 (1995) (per curiam) ("[i]mplausible or fantastic justifications may (and probably will) be found to be pretexts for purposeful discrimination"). *Accord Lewis v. Lewis.*, 321 F.3d 824, 830 (9th Cir. 2003) ("[i]f a review of the record undermines the prosecutor's stated reasons, or many of the proffered reasons, the reasons may be deemed a pretext for racial discrimination"); *See Riley v. Taylor*, 277 F.3d 261, 284 (3rd Cir. 2001) (en banc) ("[a] comparison between a stricken black juror and a sitting white juror is relevant to determining whether the prosecution's asserted justification for striking the black juror is pretextual"); *MaHaffey v. Page*, 162 F.3d 481, 485 (7th Cir. 1998) ("if an excused [juror] had characteristics and opinions that were similar to those of a juror who sat, for example, then an obvious inference ... would be that the strike was racially motivated").

The combination of the statistical disparity in the prosecutors' exercise of peremptory challenges against Hispanic males with their inconsistent and pretextual statements would have satisfied a defendant's *prima facie* burden under the law as construed by virtually every other circuit. The Eleventh Circuit's deference to the district court's conduct also directly conflicts with the *de novo* standard of review approved by the Seventh and Second Circuits. *See* p. 15 *supra*. The Court should grant this Petition to resolve these conflicts.

II.

THE COURT SHOULD GRANT THIS PETITION TO RESOLVE A CIRCUIT SPLIT CONCERNING THE RIGHT OF A DEFENDANT, WHO HAS BEEN FORMALLY EXTRADITED FROM A FOREIGN COUNTRY TO STAND TRIAL IN THE UNITED STATES, TO ENFORCE LIMITS ON HIS SENTENCE IMPOSED BY THE FOREIGN (REQUESTED) COUNTRY.

A. EXTRADITIONS FROM COLOMBIA TO THE UNITED STATES

The United States and Colombia entered into an extradition treaty on September 14, 1979. By 1981, both countries had ratified it. Articles 15(1) and 15(2) of the Treaty, codified the so-called "doctrine of specialty," the principle of international law that limits the power of the requesting country to try and punish the defendant for the charges agreed upon by the requested country. (DE1535:2.) Thus, Article 15(1) of the Treaty provided that "[a] person extradited under the treaty shall not be detained, tried *or punished* in the requesting State for an offense other than that for which extradition has been granted." (DE1535:2; emphasis added.) Article 15(2) similarly provided that the requesting country could only alter the charges if "the defendant is subject to be sentenced to a period of incarceration which does not exceed that provided for the offense for which that person was extradited." (DE1535:2.)

In 1986, however, the Supreme Court of Colombia found a defect in the ratification process. (DE1535:3, Ex. 3.) Because of this ruling, the treaty itself lacks force in Colombia. However, on December 16, 1997, the Congress of Colombia amended its Constitution to permit the extradition of Colombian nationals through the Colombian Criminal Code. (DE1535:4.) However, the amendment only applies to crimes that occur *after* the effective date of the amendment, December 16, 1997. (DE1535:4.)

B. OCHOA'S EXTRADITION

Following Ochoa's indictment, the United States submitted Verbal Note No. 1028 to Colombian authorities, seeking Ochoa's

arrest. Approximately one week later, on October 13, 1999, Ochoa was arrested and detained. Shortly thereafter, on November 26, 1999, the United States formally submitted its extradition request to Colombian authorities through Verbal Note No. 1183. (DE 1535:5.)

Ochoa contested his extradition and, simultaneously, urged the Colombian authorities to place restrictions on any extradition that was granted to conform to Article 512 of the Procedural Penal Code of Colombia. Article 512 also codified the doctrine of specialty but with an explicit emphasis on the maximum *sentence* the requesting country could impose, stating that an extradited defendant could neither be tried "nor submitted to sanctions different from those that would have been imposed in the sentence" for the same conduct in Colombia. (DE1535:6, Ex. 5; emphasis and numbering added.)

At his sentencing on August 26, 2003, Ochoa attempted to call two expert witnesses to explain the meaning of Article 512 to the district court: (1) Professor Luz Estella Nagle, a former Colombian Judge who immigrated to the United States and now worked as an Associate Professor of Law at Stetson University College of Law; and (2) Edgar Fernando Mendez Pinzon, a Colombian attorney who served as a judge in Colombia between 1980 and 1990. (DE1581:41-43.) The district court refused to consider their testimony, or the merits of Ochoa's objections to his sentence, because the government of Colombia had not lodged an objection to Ochoa's sentence. (DE1581:6, 14, 15.) The district court, however, allowed Ochoa's counsel to proffer that both Professor Nagle and Mr. Pinzon would have testified that Article 512 precluded a defendant from receiving a higher sentence in the requesting country than he or she would have received for the same conduct in Colombia – in this case 12 years. (DE1581:42-43.)

Professor Nagle's and Mr. Pinzon's proffered testimony concerning the meaning of Article 512 was consistent with the opinions issued by the Colombian courts in response to Ochoa's extradition litigation. On August 22, 2001, the Supreme Court of Colombia approved the extradition request but, in conformity with

Article 512, held that under Colombian law the drug charges in the indictment would be punished in Colombia by a sentence of 6-12 years. (DE1535:7, Ex. 7, Opinion No. 122, Supreme Court of Justice, August 22, 2001, pp. 70-71; DE1581:21.)

Five days after the decision of the Supreme Court of Colombia, the Ministry of Justice authorized Ochoa's extradition pursuant to Resolution No. 100. (DE1535:7, Ex. 8, Resolution 100.) In doing so, the Ministry of Justice expressly recognized that the Supreme Court's opinion was "binding" upon the Colombian government and that the opinion "establishe[d] that the requirements established by law to grant extradition have been met." (DE1535:7, Ex. 8, Resolution No. 100, Section 9, p. 27.) In §10 of Resolution No. 100, the Ministry of Justice expressly incorporated the Sentencing limitation imposed by Article 512 and the Supreme Court:

> 10. The Colombian Government may subordinate granting this extradition to whatever conditions it deems appropriate and, in any event, for the extradition to be granted, *the requesting State must agree that the extradited defendant* [1] will not be tried for prior actions other than those that gave rise to the extradition request, and [2] that the defendant *will not be subjected to punishment different from what would have been imposed in a sentence according to Item One, Article 512 of the Criminal Procedure Code.*

(DE1535:7, Ex. 8, Resolution 100, § 10, p. 28; emphasis and numbering added).[7]

Based on the August 22, 2001, decision of the Supreme Court of Colombia and the executive resolutions, Ochoa was extradited to

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[7] Section 11 of Resolution 100 contained an additional caveat that Ochoa's extradition must be conditioned on the requirement that "the extradited person will not be subject to ... life in prison ... pursuant to Article 11, 12, and 34 of the Political Constitution." (DE1535:7-8.)

the United States. At his sentencing, over repeated objections, the district court refused to follow the sentencing limitations imposed by the executive and judicial branches of the Colombian government and sentenced Ochoa to 365 months (30 years, 5 months) in prison. (DE1581:102.) On appeal, Ochoa continued to challenge his sentence as a violation of international law and the "doctrine of specialty." While noting the issue, the Eleventh Circuit summarily rejected it. *See Ochoa-Vasquez*, 428 F.3d at 1024, 1047.

C. THE DOCTRINE OF SPECIALTY: GENERAL PRINCIPLES

The "doctrine of specialty" prohibits an extradited defendant from being tried for crimes other than those for which extradition is permitted by international agreements, for which extradition is requested, sufficient evidence is presented and extradition granted. *United States v. Rauscher*, 119 U.S. 407, 30 L.Ed. 425, 7 S.Ct. 234 (1886). Since the doctrine is derived from international law, it is as binding as statutory law in the United States. *Gallo-Chamorro v. United States*, 233 F.3d 1298, 1305 (11th Cir. 2000) (characterizing the rule of specialty as "'a doctrine based on international comity,'" rather than on the terms of a treaty) (citation omitted). Therefore, it applies to extraditions based on Colombian decrees, as well as those through extradition treaties. "Because the surrender of the defendant requires the cooperation of the surrendering state, preservation of the institution of extradition requires that the petitioning state live up to whatever promises it made in order to obtain extradition." *Gallo-Chamorro*, 233 F.3d at 1302 (rule of specialty barred extradited Colombian national from being tried on 18 U.S.C. § 2) (citation omitted). *See also Fiocconi v. Attorney General*, 462 F.2d 475, 479-80 (2nd Cir.) (Friendly, J.) (applying rule of specialty to extradition granted as a matter of "comity" between nations rather than through an extradition treaty), *cert. denied*, 409 U.S. 1059, 34 L.Ed.2d 511, 93 S.Ct. 552 (1972).

However, there is a long-standing split in the circuits on whether a defendant has "standing" to allege a violation of the doctrine of specialty, at least absent a formal protest from the

requested nation. Prior to its decision in *Ochoa*, the Eleventh Circuit did not require such a protest. *United States v. Puentes*, 50 F.3d 1567, 1575 (11th Cir.), *cert. denied*, 516 U.S. 933, 133 L.Ed.2d 239, 116 S.Ct. 341 (1995). The Third, Eighth, Ninth and D.C. Circuits also afford standing without a protest from the requested country.[10] *See, e.g., United States v. Riviere*, 924 F.2d 1289, 1301 (3rd Cir. 1991); *Leighnor v. Turner*, 884 F.2d 385, 389 (8th Cir. 1989); *United States v. Cuevas*, 847 F.2d 1417, 1426 (9th Cir. 1988); *United States v. Najohn*, 785 F.2d 1420, 1422 (9th Cir.), *cert. denied*, 479 U.S. 1009, 93 L.Ed.2d 707, 107 S.Ct. 652 (1986); *United States v. Sensi*, 879 F.2d 888, 895 (D.C. Cir. 1989). The State of Washington has also taken this position. *See State v. Pang*, 940 P.2d 1293 (Wash.), *cert. denied*, 522 U.S. 1029, 139 L.Ed.2d 608, 118 S.Ct. 628 (1997).

However, the Second and Seventh Circuits have adopted a contrary position. *See, e.g., United States v. DiTommaso*, 817 F.2d 201, 212 (2nd Cir. 1987); *Shapiro v. Ferrandina*, 478 F.2d 894, 905 (2nd Cir. 1973), *cert. dismissed*, 414 U.S. 884, 38 L.Ed.2d 133, 94 S.Ct. 404 (1973); *United States v. Paroutian*, 299 F.2d 486, 490 (2nd Cir. 1962); *United States v. Munoz-Solarte*, No. 93-2723 & 93-3811 (7th Cir. July 18, 1994), 1994 U.S. App. LEXIS 18128; *Matta-Ballesteros v. Henman*, 896 F.2d 255, 259 (7th Cir. 1990). The Sixth Circuit has also indicated a willingness to follow a restrictive approach to standing. *See Demjanjuk v. Petrovsky*, 776 F.2d 571, 583-844 (6th Cir. 1985) ("there is a serious question whether [the defendant] has standing to assert the principle of specialty"), *cert. denied*, 475 U.S. 1016, 74 L.Ed.2d 602, 103 S.Ct. 447 (1986), *vacated on other grounds*, 10 F.3d 338 (6th Cir. 1993), *cert. denied*, 513 U.S. 914, 130 L.Ed.2d 205, 115 S.Ct. 295 (1994). The First, Fourth and Fifth Circuits have recognized the split in authority but have not yet taken clear positions. *See United States v. LeBaron*, 156 F.3d 621, 627 (5th Cir. 1998); *United States v. Saccoccia*, 58 F.3d 754, 767 n. 6 (1st Cir. 1995); *United States v. Davis*, 954 F.2d 182 (4th Cir. 1993).

D. THE VIOLATION IN *OCHOA*

The Eleventh Circuit's summary affirmance of the district court's 365 month sentence for Ochoa provides this Court with the stark set of facts upon which to resolve this long-standing conflict, since Ochoa's sentence was nearly three times the maximum set by Colombia.

Just as the requested country has the right to define and limit the scope of the charges to which an extradited defendant may be forced to defend in the requesting country, the requested country has the right to define and limit the penalty the extradited defendant may be forced to serve upon his conviction in the requesting country. In homicide cases, for example, the United States typically agrees to forgo the death penalty in order to obtain favorable extradition rulings from the Requested countries. *See generally* Ved P. Nanda, *Essay: Bases For Refusing International Extradition Requests - Capital Punishment and Torture*, 23 FORDHAM INT'L L. J. 1369 (2000); Matthew W. Henning, *Extradition Controversies: How Enthusiastic Prosecutions Can Lead To International Incidents*, 22 B.C. INT'L & COMP. L. REV. 347, 355-56 (1999); Craig R. Roecks, *Extradition, Human Rights, and the Death Penalty: When Nations Must Refuse To Extradite a Person Charged With a Capital Crime*, 25 CAL. W. INT'L L.J. 189 (1994).

Other sentencing limitations are also enforceable under the doctrine of specialty. Indeed, the Eleventh Circuit's refusal to enforce the limitations in *Ochoa* is in direct conflict with the Second Circuit's decision in *United States v. Campbell*, 300 F.3d 202, 211 (2nd Cir. 2002), *cert. denied*, 538 U.S. 1049, 155 L.Ed.2d 1090, 123 S.Ct. 2114 (2003). In that case, the Second Circuit agreed that the 155-year sentence the district court imposed on Campbell violated the terms of his extradition from Costa Rica, which limited Campbell's potential sentence to a maximum of 50 years. The Second Circuit then approved the manner in which the district court enforced this limitation. The district court imposed a sentence of 155 years but "then attached to the judgment of conviction an order stating that

to the Second Circuit, "[t]hat order constitutes an integral part of the judgment, and it clearly and dispositively establishes that the 'maximum sentence' to be served by Campbell – his 'real serving time' – is 50 years." *Id. See also United States v. Abello-Silva*, 948 F.2d 1168, 1171 n. 1 (10th Cir. 1991) (approving defendant's sentence of 30 years, the maximum permitted by the terms of his extradition, recognizing that "[t]he length of appellant's imprisonment [was] limited by agreement between the United States and Colombia").

The Colombian extradition decrees involving Ochoa were entitled to a similar deference. Accordingly, prior to his sentence, Ochoa expressly requested that the district court either sentence Ochoa to a sentence of 6-12 years or, as in *Campbell*, attach to Ochoa's judgment an order stating that Ochoa "shall be released after he serves a period of incarceration not greater than 12 years." (DE 1535) The district court refused and the Eleventh Circuit subsequently allowed Ochoa's 365 month sentence to stand without any limitations.

CONCLUSION

For all the reasons presented in the foregoing petition, the Court should grant the requested writ of certiorari to the Court of Appeals for the Eleventh Circuit.

Respectfully submitted,

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